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November 12, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

EX PARTE OR LATE FILED



Re: Ex Parte Presentation in CC Dock No. 96-98
CCB Pol 96-14

Dear Mr. Caton:

On Friday, November 8, 1996 Mark Rosenblum and I met with Regina Keeney, Larry Atlas and Richard Metzger to discuss the Texas Public Utility Commission's petition for reconsideration and preemption issues raised in the above referenced proceedings. The attached material was furnished to the attendees of the meeting.

Because the meeting was concluded late in the day and Monday, November 11, 1996 was a federal holiday, two copies of this Notice are being submitted on the following business day to the Secretary of the FCC in accordance with Section 1.1206(a) (1) & (2) of the Commission's Rules.

Sincerely,

Attachments

cc: Regina Keeney
Larry Atlas
Richard Metzger

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## Principal Texas Law Provisions Subject to Preemption

**1. The "build-out" requirement and related resale/unbundled element restriction.**

These provisions (§§ 3.2431(c), 3.2531(d), 3.453) require the three largest long-distance carriers, as a condition of providing local service, to commit to build facilities throughout the area they seek to serve. Relatedly, with a narrow exception permitting the use of unbundled loops in a portion of that area, these provisions prohibit those carriers from using resale or unbundled network elements to provide that service. These provisions were expressly justified by their chief legislative sponsor as a means of keeping large long-distance carriers out of the local market until Southwestern Bell is permitted to enter the long-distance market. The Texas law thus provides that the build-out requirement will be eliminated if and when Southwestern Bell receives interLATA authority.

The build-out requirement and related restrictions violate Section 253(a) by requiring a large and prohibitive capital investment as a condition of providing local service. They are likewise preempted by Sections 251(c)(3) and 251(c)(4), which permit all carriers, as a matter of federal law, to provide service through the purchase of unbundled elements or through resale. They are also thoroughly inconsistent with the whole thrust of Sections 251 and 271, which require that local markets be opened to competition prior to, rather than concurrently with, any interLATA entry by a Bell Company.

The Texas PUC's waiver of the build-out requirement as applied to Sprint does not moot the need for preemption. The PUC described its waiver as "preliminary in nature" and subject to reversal, and in any event granted the waiver expressly <u>because</u> the Commission would be deciding the preemption issue. Indeed, Texas has expressly requested an expedited ruling on the subject. In any event, it is settled law that a State's voluntary cessation of enforcement of a law does not moot a legal challenge to that law. <u>See, e.g., City of Mesquite</u> v. <u>Aladdin's Castle, Inc.</u>, 455 U.S. 283, 289 (1982).

The Eighth Circuit's stay of the Commission's Section 251 pricing rules in <u>Iowa Utilities Board v. FCC</u> does not affect the Commission's duty to preempt these provisions. Neither the Commission's authority under Section 253, nor the requirement of Section 251 that new entrants be permitted to provide local service through resale and purchase of unbundled elements, are affected by that stay. Nor do those requirements appear to be implicated by any additional claims petitioners are likely to make in briefing that case on the merits.

**2. The prohibition on entry by the larger long-distance carriers in small local exchanges.**

This provision (§ 3.2531(h)) prohibits the three largest long-distance carriers from receiving a certificate of operating authority prior to September 1, 1998, in any exchange of an incumbent LEC serving fewer than 31,000 access lines. It is an express barrier to entry that violates Section 253(a), which forbids any law that prohibits "any entity" from providing "any interstate or intrastate telecommunications service." Because the Iowa Utilities Board case does not implicate Section 253, neither the stay nor any subsequent Eighth Circuit order bears on the Commission's duty to preempt this provision.

**3. The restrictions on resale applicable to holders of service provider certificates of operating authority.**

These provisions establish a panoply of restrictions and limitations on resale in Texas. They provide for a 5% resale discount (§ 3.2532(d)(2)), establish that even that discount will not apply in exchanges serving fewer than 31,000 access lines (§ 3.2532(d)(2)(E)), prohibit resale discounts on optional extended area and expanded area plans (§ 3.2532(d)(2)(E)), prohibit the termination of both resold flat rate local services and services obtained under the resale tariff to a single end user (§ 3.2532(d)(5)), and prohibit a carrier from using resold flat rate local exchange service to provide access services to other carriers (§ 3.2532(d)(6)).

These provisions violate numerous provisions of the Act. They establish a resale discount without regard to the avoided cost methodology required by Sections 251(c)(4) and 252(d)(3). They create exclusions from resale in violation of Section 251(c)(4)(A)'s requirement that "any telecommunications service" be available for resale. They impose "unreasonable or discriminatory conditions or limitations" on resale in violation of Section 251(c)(4)(B). And they violate § 253(a)'s prohibition of state laws that prevent "any" entity from providing "any" service because they will prevent some services from being resold, and will otherwise impede new entrants' ability to provide service through resale.

Any argument that the 5% resale discount provision cannot be preempted in light of the Eighth Circuit's stay order should be rejected. First, that stay does not in any way affect the Commission's authority under Section 253. Second, the unlawfulness of the 5% discount under Sections 251 and 252 is not dependent on its inconsistency with the FCC's rules. Even if no such rules had been issued, the 5% discount would be unlawful because it does not even purport to reflect the avoided cost methodology required by Sections 251(c)(4) and 252(d)(3).

None of the other challenged provisions on resale are designed to set prices, and the Eighth Circuit's stay is thus not even arguably applicable to those other provisions. Nor are any of the claims expected to be raised in the merits briefing likely to impact the lawfulness of those non-price provisions.

Finally, the recent Texas arbitration decision likewise does not moot these issues. The arbitrator did establish a resale discount of 19.69%, apparently recognizing that the 5% statutory discount could not be applied consistent with the 1996 Act. However, as the Justice Department pointed out in its comments before this Commission (p. 22), "[t]hat the Texas PUC acknowledges that federal law supersedes the state restrictions is hardly reason for allowing the inconsistent state restrictions to stand . . . ; rather, it strengthens the case for preemption."

**4. The access charge freeze.**

The Texas Law imposes (§ 3.352(b)(1)) a four-year freeze on any reduction in switched access charges of any incumbent LEC that elects price cap regulation. This provision violates Section 254(k) of the Act, which prohibits any incumbent LEC from using noncompetitive services to subsidize intraLATA toll or any other competitive service. This mandated removal of all implicit and other subsidies in intrastate and interstate access charges would be unlawfully precluded by the four-year freeze. Nothing in the Eighth Circuit's stay, or the arguments that will be made by petitioners in their merits briefs in that case, relate to Section 254(k) or otherwise affect the Commission's authority to declare this provision preempted.